

177600



DEPT. OF TRANSPORTATION
DOCKETS

02 JUN 26 PM 12:30

June 24, 2002

National Highway Traffic Safety Administration
Docket Management
Room PL-401
400 Seventh Street, S.W.
Washington, D.C. 20590

**Re: Docket No. NHTSA-02-12150; Confidential Business Information - 4
Notice of Proposed Rulemaking (NPRM)**

Ladies and Gentlemen:

Blue Bird Body Company (Blue Bird) is submitting this comment in response to the National Highway Traffic Safety Administration's (NHTSA) Confidential Business Information NPRM, as published in the April 30, 2002 *Federal Register*.

Blue Bird, with its headquarters offices in Fort Valley, Georgia, is a major manufacturer of buses, school buses, and motor homes.

Introductory Comments

Blue Bird expresses its grave concern that NHTSA, in its Confidential Business Information NPRM, is attempting to override the TREAD Act's intended protection of early warning data, which can only be made public if NHTSA determines that this would assist in carrying out the agency's safety defect or Federal Motor Vehicle Safety Standards (FMVSS) noncompliance investigatory or recall oversight functions. As pre-investigative information, all of the early warning data is within the protected boundaries of the TREAD Act.

In addition, Blue Bird emphasizes the competitive harm which it would incur, were such highly proprietary matters as production information, warranty claims and field reports compromised by being placed in the agency's public records.

The TREAD Act Restricts Disclosure of Early Warning Data

The TREAD Act contains a disclosure provision which is expressly related to the information received by NHTSA pursuant to its yet to be issued early warning reports regulation. It provides:

"None of the information collected pursuant to the [early warning] final rule ... shall be disclosed pursuant to Section 30167(b) unless [NHTSA] ... determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121."

There are two central considerations flowing from the disclosure provision's reference to the National Traffic and Motor Vehicle Safety Act's §30167(b). First of all, any information

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considered for disclosure under that provision must have been treated as confidential. Secondly, such confidential information must relate to a defect or noncompliance investigative or recall oversight activity on the part of the agency. Blue Bird believes that the Congress of the United States put the restrictive disclosure clause in the TREAD Act, (1) intending it to have substantive application, and (2) providing that manufacturer submission of pre-investigative, early warning data must not be automatically released in the NHTSA public records unless and until the agency makes the requisite determination that such release would assist in carrying out its investigative or recall oversight functions.

The agency's attempt, in the Confidential Business Information NPRM, to assert that early warning report information is at risk unless the agency has first received and granted a petition for confidential treatment cannot possibly be reconciled with the TREAD Act disclosure clause.

Even prior to the passage of TREAD, Blue Bird's consistent experience was that NHTSA did not routinely release into its public records information obtained from pre-investigative inquiries. In practical terms, the wholesale public availability of early warning materials now apparently contemplated by NHTSA not only is contrary to TREAD, but also conflicts with the agency's longstanding policy.

Restating the obvious, the TREAD Act disclosure language means what it says. It is not an extraneous bit of legislative debris which can be ignored or construed out of existence. Stated simply, there can be no other reason for Congress's inserting the disclosure provision in the TREAD Act, other than that the Congress intended to limit disclosure of early warning report materials.

With respect to the agency's proposed, presumptively releasable "class determination" data, Blue Bird, again, urges NHTSA to give credence and adherence to the protections of the TREAD Act. To the extent that the agency would attempt to apply its proposed class determinations--related to consumer complaints/documentation, property damage and warranty claims and possibly field reports--the company contends that NHTSA has stepped over the line in violating the language and intent of TREAD.

Blue Bird calls the agency's attention to Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(3), which precludes disclosure of information "specifically exempted from disclosure by statute," in this case the TREAD Act, which, as contemplated by the FOIA, "establishes particular criteria for withholding...." In the latter case, of course, NHTSA has the latitude to make the affirmative determination to disclose early warning report information where it will assist in carrying out its defect/noncompliance investigative or recall review functions.

Both government and industry have an obligation to comply with all applicable provisions of the TREAD Act. Blue Bird intends to do so; it expects no less of NHTSA.

Release of Early Warning Data Will Result in Competitive Harm to Blue Bird

The agency's early warning reports NPRM would require vehicle manufacturers to periodically furnish NHTSA with, among other things, detailed production information, field reports and warranty claim information. Each of these data categories has a very high level of competitive sensitivity for Blue Bird.

First of all, Blue Bird's production data are not publicly reported or available. Public release by the agency of this kind of information would unquestionably benefit Blue Bird's competitors, who could then chart the strengths and weaknesses of Blue Bird's business within specific make, model and model year classifications. As well, Blue Bird's competition could relate the production information to field reports and warranty claims, for purposes of using these latter types of information in gaining a marketing advantage over Blue Bird with prospective customers in the field. Indeed, these three categories of early warning data provide a ready-made tool for competitor use in conducting market research and strategic planning.

With respect to field reports, Blue Bird notes that the extensive communication between its field service representatives and Blue Bird's 52 distributors in the United States primarily involves requests for technical advice, but oftentimes is characterized by secondhand, anecdotal bits of "intelligence" which may or may not have any factual basis. Beyond Blue Bird's concerns about competitor usage of field report information to damage the Company's competitive position and reputation with prospective customers, Blue Bird is also concerned that this type of unverified, free-wheeling field communication process could compromise the operations and reputations of customer fleets.

Likewise, were warranty data to be placed in the agency's public files, competitors, both real and potential, would be given a free ride in learning about Blue Bird's warranty experiences with various vehicle systems, components and parts. This is extremely valuable information, which for obvious reasons is not made publicly available by Blue Bird (and, for the same reason, any of its competitors), and the resulting competitive harm from placement of such sensitive information in the public docket is clear.

NHTSA's Confidential Business Information Rule, both in its present form and as proposed, recognizes that one factor in supporting a claim for confidentiality is a possibility that NHTSA might otherwise be impaired in its ability to obtain similar information in the future. [Current §512.5(b); proposed §5218(c)(3).] If warranty claim and field report documentation is to become "broadcast" material for all to see in the agency's public records, NHTSA can reasonably anticipate that the quality and specificity of this information will be significantly reduced, as manufacturers understandably take measures to minimize their respective exposures to competitive harm.

For all the reasons as outlined above, NHTSA should establish a class determination which confirms the TREAD Act's disclosure restriction and protects early warning report submissions from public disclosure, subject only to the agency's affirmative determination as recognized and required in TREAD.

**The Period for Requesting Reconsideration of
Confidentiality Denials Should be Extended**

The ten (working) day cutoff period for a petitioner to request reconsideration for a denial of confidential treatment should be amended to give small to medium-sized companies like Blue Bird and their reduced staffs the opportunity to undertake the type of expanded review which the Company would need in cases where it must fully consider and present all possible arguments and justifications to protect what to Blue Bird is proprietary, competitively sensitive information. Accordingly, Blue Bird suggests that the agency consider lengthening the reconsideration period to 20 business days or 30 calendar days after the submitter of the information has received notice of the denial.

NHTSA Has the Legal Responsibility to Redact Personal Information

While Blue Bird acknowledges that, under proposed §512.5(c), NHTSA would only be requesting that submitters redact personal information from the public copy of submissions, the Company notes that the protection of so-called “personal identifiers” rests, under the law, with NHTSA. It would be indeed a risky enterprise for the agency to rely on the redaction activity of those volunteers from industry who undertake this activity. The only predictable outcome in such a case would be its unpredictability.

Blue Bird appreciates this opportunity to comment on the Confidential Business Information NPRM, and urges favorable consideration of its views by NHTSA.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas D. Turner", with a stylized flourish at the end.

Thomas D. Turner
Manager, Engineering Services

c: Douglas J. Freeman—Blue Bird Body Company